No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,

Appellant,

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, Acting Comptroller of the Currency,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees First City National Bank of Houston and Southern National Bank of Houston move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

First City National Bank of Houston (First City) and Southern National Bank of Houston (Southern), pursuant to the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), filed an application with the Comptroller of the Currency of the United States (Comptroller) for permission to merge. In accordance with the Bank Merger Act of 1966, the Comp-

troller considered the extensive evidence of First City and Southern in support of their application, requested and considered opinions of the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Department of Justice, made appropriate findings of fact, and approved the merger on September 20, 1966, determining that (1) the effect upon competition of the proposed merger would be minimal and insubstantial and (2) in any event, any anticompetitive effects of the proposed merger would be clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

The Department of Justice (Department) filed suit under Section 7 of the Clayton Act, 15 U.S.C. § 26, seeking to enjoin the merger. The Department's complaint made no reference to the Bank Merger Act of 1966 and did not contain factual allegations sufficient to serve as a basis for demonstrating a violation of that Act. The court below, on motion of the Comptroller of the Currency, dismissed the suit on the pleadings because of the Department's failure to allege facts sufficient to demonstrate a violation of the controlling statute, the Bank Merger Act of 1966.. The court concluded that in order to properly allege a violation of the Act, the Department is required to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Reluctant to dismiss on the pleadings, the trial court allowed the Department ten (10) days to amend its complaint, indicating it would be willing to extend more time if necessary.

The Department was then free to amend and proceed to trial on the merits without making any binding admission as to the burden of pleading, pleading in the alternative if

it wished. Fed. R. Civ. P. 8(e)(2). This would have permitted the instant case and all questions of construction of the Bank Merger Act to be disposed of in one trial and in one appeal. However, the Department has chosen to bring this case before the Court in piecemeal fashion on a bare pleading question and to stand adamantly on a complaint based solely on Section 7 of the Clayton Act despite six decisions of district courts to the contrary in the past ninety days.[1]

QUESTION PRESENTED

The trial court's order of dismissal presents merely the question of what the Department is required to allege in its complaint. The questions of burden of proof or of going forward, which, of course, can be independent of the burden of pleading, and of the weight to be given to the Comptroller's decision, were not before the trial court at the pleading stage.

Insofar as the Department would have this Court consider the question presented to contain the questions of where the burden of going forward and burden of proof lie and what the nature of review is, it is in error. The question may be properly stated as follows:

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[1] The instant case and: United States v. Mercantile Trust Co., 1966 Trade Reg. Rep. ¶.... (E. D. Mo. Dec. 19, 1966) (Dismissed on Pleadings); United States v. Third National Bank of Nashville, 1966 Trade Reg. Rep. ¶71,934 (M. D. Tenn.) (Trial on Merits); United States v. Provident National Bank, 1966 Trade Reg. Rep. ¶71,931 (E. D. Pa.) (Holding in denying motion to dismiss); United States v. Crocker-Anglo National Bank, 1966 Trade Reg. Rep. ¶71,898 (D. C. Cal.) (Decision remanding cause to Comptroller); United States v. First National Bank of Hawaii, Civ. No. 2540, D. Hawaii 1966 (Oral Opinion of October 31, 1966, Transcript pp. 91-94) (Holding on denial of motion to dismiss.)

Whether the Bank Merger Act of 1966 requires the Department of Justice in an antitrust suit seeking to enjoin a bank merger to allege in its complaint sufficient facts to invoke the standards set forth in such Act including an allegation that the merger's anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

THE QUESTIONS ON WHICH THE DECISION OF THE COURT DEPENDS ARE UNSUBSTANTIAL

The only action of the trial court before this Court for review is its judgment granting the Comptroller's motion to dismiss. The Comptroller's motion was predicated on the premise that the complaint failed "to state facts sufficient to support a cause of action." The decision of the trial court was based on the pleadings before it. Its holding was simply that the Department is required to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

It is clear that while the burden of pleading and the burden of proof usually correspond, they do not necessarily do so. *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943); CLARK ON CODE PLEADING § 96, at 610 (2d ed. 1947); Annot., 130 A.L.R. 440, 480 (1941). Thus, a court by dismissing a complaint for defective pleading does not thereby decide the burden of proof. It remained open for the Department to argue on trial of the case that the burden of proof on this question should properly be placed upon the defendants and that no weight is to be given to the Comptroller's determinations on this and other issues.

The trial court had no opportunity to determine the questions of burden of proof and the weight to be given the Comptroller's decision in the proper and illuminating context of a trial on the merits. Fundamental to our system is the avoidance of abstract and advisory decisions. We submit that under our principles of procedure and judicial administration only one question can properly be considered to be before this Court: Can the Department base its suit solely on Section 7 of the Clayton Act or is it required to plead under the Bank Merger Act of 1966 that the anticompetitive effects of a proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served? It is manifest that the trial court was correct in requiring the Department to so plead.

The Burden of Pleading Is Clearly Placed On the Department of Justice by The Bank Merger Act of 1966.

Both the structure of the Bank Merger Act of 1966 and its legislative history make clear that the Department has the burden of pleading that the anticompetitive effects of a challenged merger are not clearly outweighed in the public interest. The statutory standards defining a violation of the Act are contained in one general clause with a basic exception contained as an intrinsic part of that same clause. The Act provides that a responsible agency shall not approve:

> any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the

> public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

It explicitly requires courts to apply an identical standard in reviewing an agency approval. See Section 7(B) of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(7)(B). The appropriate and controlling principle for statutes containing exceptions within a general clause defining an offense was long ago stated by this Court in *United States* v. *Cook*, 84 U.S. 168, 173 (1872):

> Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defence and must be shown by the accused.

Accord, *Seese* v. *Bethlehem Steel Co.*, 74 F. Supp. 412, 416 (D. Md. 1947), *aff'd*, 168 F. 2d 58 (4th Cir. 1948). See Annot., "Burden of allegation and proof in civil causes as regards exception in statute", 130 A.L.R. 440 (1941); Annot., "Burden of averment and proof as to exception in criminal statute on which the prosecution is based", 153 A.L.R. 1218 (1944).

Consideration of the public interest is so incorporated with the language defining a violation of the Bank Merger Act of 1966 that the standards for what constitutes a viola-

tion of the Act cannot be adequately defined without reference to the public interest factor.

The bulk of the Department's argument does not go to the question of the burden of pleading but rather to the questions of the burden of proof and the extent of proof and thus is not germane to the questions presented to this Court. The one argument that the Department seeks to make on the actual pleading question is based on the structure of the statute. It contends that where a party relies on a statute containing a general clause followed by an exception or proviso in a subsequent substantive clause, such exception is a matter of defense and need not be negatived. This is a misleading oversimplification and is inapplicable. The Bank Merger Act of 1966 is not a statute containing a general clause with an exception contained in a subsequent substantive clause of the statute. As demonstrated, the standards are contained in one general clause, and the exception is contained as an intrinsic part of that same clause.[2]

The legislative history of the Bank Merger Act of 1966 is clouded by conflicts in the strongly partisan positions

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[2] *United States* v. *King & Howe*, 78 F. 2d 693 (2d cir. 1935), upon which the Department relies, is in accord with the general rule that where an exception is not a part of the general clause, but is contained in a subsequent provision of the statute, the exception need not be plead by the party relying on the general clause of the statute. Annot., 130 A.L.R. 440, 443 (1941). The case concerned Section 7 of the Food and Drug Act, 21 U.S.C. §8, which contains a general clause followed in subsequent provisions of the statute by an exception, 78 F.2d at 695. However, the regulations based on that section of the statute contained the exception within the general clause. 78 F.2d at 696. The Second Circuit concluded that the wording of the regulations could not alter the nature of the proviso contained in the statute and thereby change the rule of pleading. 78 F.2d at 696. The implication is clear that had the statute contained the exception within the general clause, as did the applicable regulations, the Department would have been required to negate the exception in its pleadings in accordance with long-standing general principles. See *United States* v. *Cook*, 84 U.S. 168, 174 (1872). Annot., 130 A.L.R. 440, 441 (1941).

taken by the bill's proponents and opponents as to its proper interpretation. On one point, however, there is no controversy. The bill was designed to eliminate the conflict caused by the variance in standards applied in evaluating bank mergers by the Department of Justice and the various banking administrative agencies. As the House Committee on Banking and Currency stated:

> "The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice and the courts under the antitrust laws — standards stricter than those in the Bank Merger Act [of 1960], but which include both the effect of the merger on competition and the convenience and needs of the community to be served. . . ." H. R. Rep. No. 1221, 89th Cong., 2d Sess. 1 (1966).

Congressman Patman, Chairman of the House Committee on Banking and Currency, upon whose understanding of the Act the Department has heavily relied, summarized this purpose succinctly:[3]

> "The major purpose of this bill is to provide a single standard for the approval and adjudication of bank mergers prior to their consummation . . . Under the Bank Merger Act of 1960 the bank supervisory agencies approved bank mergers on the basis of one standard and the Justice Department was free to attack these same mergers under the Sherman and Clayton Antitrust Acts. The Supreme Court of the United States in the Philadelphia National Bank case in June of

[3] Many other congressmen can be cited on this point. See, *e.g.*, 112 Cong. Rec. (Daily ed.) 2333 (Congressman Smith, Va.); 112 Cong. Rec. (Daily ed.) 2336 (Congressman Multer); 112 Cong. Rec. (Daily ed.) 2337 (Congressman Brock); 112 Cong. Rec. (Daily ed.) 2339 (Congressman Ashley); 112 Cong. Rec. (Daily ed.) 2343 (Congressman Stanton); 112 Cong. Rec. (Daily ed.) 2355 (Congressman Grabowski). The sense of the Senate was the same. 112 Cong. Rec. (Daily ed.) 2538 (Senator Robertson); 112 Cong. Rec. (Daily ed.) 2545 (Senator Hart).

1963 held that the Bank Merger Act of 1960 did not preclude the application of the antitrust laws to bank mergers. The banking agencies and the courts continued to act under distinct statutory authority. A majority of your committee felt that the law should provide a single standard to be applied by the agencies and the courts alike.

"This is exactly what this bill does. The single standard that the bill establishes is found in paragraph 5(b) . . ." 112 Cong. Rec. (Daily ed.) 2333.

In view of the plain meaning of the statute, which is clearly reinforced by the legislative history, banks contemplating merger now should be able to do so with the assurance that their application will not be evaluated by one set of standards by the banking agencies and then attacked on the basis of another set of standards by the Department of Justice.

This paramount statutory purpose of requiring the banking agencies, the Department of Justice, and the courts to apply a single set of standards in evaluating bank mergers requires that the burden of pleading the anticompetitive effects of the proposed transaction are not clearly outweighed in the public interest be placed upon the Department of Justice. The Department's position that it is entitled to evaluate a merger and file a lawsuit without being required to plead that the anticompetitive effects of the transaction are not clearly outweighed in the public interest would thwart the Congressional purpose. Mergers which were manifestly legal under the Bank Merger Act of 1966 could be approved by administrative agencies on the ground that the anticompetitive effects of the transaction were clearly outweighed in the public interest and subsequently attacked by the Department of Justice on the basis of another set of standards. This pleading question is peculiarly vital in an area where

the mere institution of a suit, with the resultant automatic statutory stay, can in itself frustrate a proposed merger. See, *e.g.*, *United States* v. *First National Bank of State College*, 5 Trade Reg. Rep. 52,622 Cas. No. 1900 (D. Pa. 1966). (Banks withdrew application for approval to merge after complaint was filed.) Congress cannot have intended that a plaintiff become entitled to an automatic injunction without even having the burden of alleging all the facts necessary to demonstrate a violation of the controlling statute. The burden of pleading that the benefits of the transaction in the public interest do not clearly outweigh the anticompetitive effects gives the Department the duty of making the allegation in good faith, whether it has the burden of proof or not. Fed. R. Civ. P. 11; CLARK ON CODE PLEADING § 41, at 253 (2d ed. 1947).[4] This, of course, assures that the new statutory standards would be honored by the Department of Justice in its administration of its duties under the statute as Congress intended.

CONCLUSION

The Department of Justice, declining an opportunity to amend, elected to stand on its pleadings in order to test its theory of the Bank Merger Act of 1966. It thereby brought before this Court in piecemeal fashion a narrow pleading question. The public interest "exception" in the Bank Merger Act, which is the controlling statute in this

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[4] After meeting this pleading burden, the Department is, of course, free to argue that the usual rule that the burden of pleading corresponds with the burden of proof should not be followed and that no weight is to be given the Comptroller's findings. This is in effect what occurred in *United States* v. *Provident National Bank*, E. D. Pa., No. 40032. The trial court did not dismiss on the pleadings, 1966 Trade Reg. Rep. ¶71,931. However, when the Department subsequently took the position that it would not meet the burden of proof which the court determined that it had, the court gave judgment to the defendants 1966 Trade Reg. Rep. ¶..... (Opinion of December 29, 1966.)

case, is contained in the statute as an integral part of the general standard. The Department cannot allege grounds for equitable relief without pleading sufficient facts to bring it within the controlling statutory standard. Thus, the Department's pleadings manifestly are defective, and the district court properly dismissed them. The Department of Justice cannot in good conscience complain of the effect of an affirmance in choosing to stand on a pleading question. It placed the appellee banks in a position where they might well have to face multiple appeals, first on the pleadings and then on the merits, causing protracted delay which would be commercially unendurable for the appellees. The district court's order of dismissal, which became final only after the Department had refused the opportunity to amend, should be affirmed.

Wherefore, appellees pray that this motion to affirm be in all things granted and that the judgment of the district court be affirmed.

Respectfully submitted,

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